

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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JUSTINE GUERRA,

Plaintiff,

v.

Civil Action No.  
8:13-CV-1215 (DEP)

CAROLYN COLVIN, Commissioner of Social  
Security,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

SCHNEIDER LAW FIRM  
57 Court Street  
Plattsburgh, New York 12901

MARK A. SCHNEIDER, ESQ.

FOR DEFENDANT

HON. RICHARD S. HARTUNIAN  
United States Attorney  
P.O. Box 7198  
100 S. Clinton Street  
Syracuse, NY 13261-7198

LAUREN E. MYERS, ESQ.  
Special Assistant U.S. Attorney

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

## ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard in connection with those motions on December 12, 2014, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

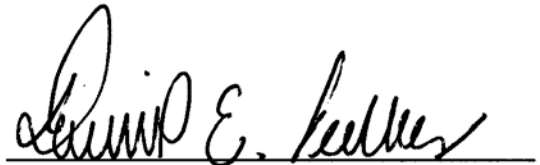
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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18 (formerly, General Order No. 43) which was issued by the Hon. Ralph W. Smith, Jr., Chief United States Magistrate Judge, on January 28, 1998, and subsequently amended and reissued by Chief District Judge Frederick J. Scullin, Jr., on September 12, 2003. Under that General Order an action such as this is considered procedurally, once issue has been joined, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

1) Defendant's motion for judgment on the pleadings is  
GRANTED.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: January 7, 2014  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
JUSTINE GUERRA,

vs.

13-CV-1215

COMMISSIONER OF SOCIAL SECURITY.  
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Transcript of DECISION held on  
December 12, 2014, at the James Hanley U.S. Courthouse,  
100 South Clinton Street, Syracuse, New York, the  
HONORABLE DAVID E. PEEBLES, Presiding.

A P P E A R A N C E S

For Plaintiff: MARK A. SCHNEIDER, ESQ.  
(Via Telephone) 57 Court Street  
Plattsburgh, New York 12901

For Defendant: SOCIAL SECURITY ADMINISTRATION  
(Via Telephone) Office of Regional General Counsel  
Region II  
26 Federal Plaza - Room 3904  
New York, New York 10278  
BY: LAUREN E. MYERS, ESQ.

1 (In chambers, via telephone:)

2 THE COURT: I have before me an application by the  
3 plaintiff to set aside a commissioner's determination of no  
4 disability under 42, United States Code, Section 405(g).

5 The background in this case is as follows: The  
6 plaintiff was born in September of 1969 and is currently 45  
7 years of age. She was 42 at the time of the administrative  
8 hearing in this matter.

9 She lives in Ticonderoga, New York with her son,  
10 her son's father, her son's wife and her daughter-in-law.  
11 She last worked in July of 2010 as an attendant/supervisor in  
12 a laundromat. She also has prior work history as a cashier,  
13 a census taker and having responsibility for school  
14 fundraisers. She has an associates degree in business  
15 management.

16 She stopped working due to pain in her lower back  
17 and legs, according to her testimony, and has been drawing or  
18 was drawing since then unemployment benefits.

19 She has been taking online courses through a  
20 New York 599 program.

21 She suffers from diagnosed conditions including  
22 obesity. She is 4 foot 9 and was 205 pounds, plus or minus,  
23 although had been as high as 258 pounds. She suffers from  
24 back and neck pain radiating down her legs, diabetes, sleep  
25 apnea, polycystic ovary syndrome -- or POS -- and depression,

1 although she has not undergone any treatment for depression.

2 She is on various medications, including Vicodin  
3 and Wellbutrin®, which she was on initially to stop smoking  
4 or help her stop smoking but at the direction of her treating  
5 physician, continued with Wellbutrin®.

6 She applied on July 15, 2010, for disability  
7 insurance benefits and on the following day for SSI benefits  
8 alleging a disability onset date of July 7, 2010.

9 A hearing was conducted by administrative law judge  
10 or ALJ Michelle Marcus on April 12, 2012. ALJ Marcus  
11 rendered a decision on August 14, 2012. The Social Security  
12 Administration Appeals Council denied review on September 17,  
13 2013.

14 In her decision, ALJ Marcus first noted that the  
15 plaintiff was insured through December 31, 2015, and had not  
16 engaged in substantial gainful activity since July 7, 2010.

17 She found that the plaintiff suffers from several  
18 severe -- at step two -- impairments, including cervical and  
19 lumbar degenerative disc disease, sleep apnea, asthma,  
20 diabetes, and obesity. She noted at step two that plaintiff  
21 had never been diagnosed formally and treated for depression  
22 or any other mental disorder.

23 At step three she considered several listings,  
24 including 1.04, and rejected that because there was no  
25 evidence of nerve root compromise. She considered 3.03 and

1 3.10 with regard to asthma and 9.00 in connection with  
2 diabetes and found that plaintiff's condition did not meet or  
3 medically equal any of those listings.

4 In terms of residual functional capacity, the ALJ  
5 concluded that plaintiff retains the ability to perform  
6 sedentary work as defined by regulations, except that, while  
7 she can lift and carry 10 pounds occasionally and stand or  
8 walk for up to two hours total and sit for up to a total of  
9 six hours in an eight-hour workday, she must avoid  
10 concentrated exposure to respiratory irritants and avoid  
11 exposure to vibrations.

12 In arriving at that determination, she did consider  
13 the plaintiff's credibility and concluded that, although she  
14 does suffer from impairments that could cause the symptoms  
15 complained of, her testimony was not entirely credible and  
16 went through an analysis at Page 27 of the record concerning  
17 that.

18 At step four she concluded that plaintiff is  
19 capable of performing her past relevant work as a school  
20 fundraiser consultant but went on at step five to conclude,  
21 in any event, that, first, plaintiff's non-exertional  
22 limitations have little or no effect on the job base on which  
23 the grids are predicated and concluded, using Rule 201.28,  
24 that she is not disabled.

25 As you know, the scope of review is extremely

1 generous. I am tasked with determining whether the correct  
2 legal standards were applied and whether the decision is  
3 supported by substantial evidence. The courts, including the  
4 Supreme Court, have defined "substantial evidence" as such  
5 relevant evidence as a reasonable mind might accept as  
6 adequate to support a conclusion.

7 In this case it's clear to me that the ALJ's  
8 decision is supported by substantial evidence. She  
9 considered the combination of plaintiff's impairments and the  
10 limitations associated with them. There really isn't any  
11 evidence from a medical source in the record that is contrary  
12 to the RFC finding.

13 I know that plaintiff has suggested that nurse  
14 practitioner Wilkinson does not believe she can work but at  
15 Page 432, nurse practitioner Wilkinson stated that plaintiff  
16 has no limitation in sitting. She does say that she is  
17 limited in her ability to lift, carry, stand and walk but was  
18 not able to specifically quantify those limitations.

19 There is, as plaintiff noted in the brief, an  
20 indication at Page 438 that nurse practitioner Wilkinson,  
21 quote, "gave the plaintiff a note for work" but there's no  
22 indication there as to what that note said, whether it said  
23 light duty only, whether it said she can't work at all, but  
24 in that same notation, she indicated that the plaintiff was  
25 not in acute distress and was ambulating normally.



1           The consultative report of Dr. Welch supports the  
2 ALJ's decision. Dr. Welch concluded at Page 547 by stating,  
3 the reality is that physically, she -- meaning the  
4 plaintiff -- has few limitations. Dr. Welch's report  
5 supports the RFC in all respects.

6           The commissioner's determination is also supported  
7 by nurse practitioner Wilkinson's notes. Dr. Paolano's  
8 report, albeit that dates back a couple years, he found  
9 normal range of motion, for example. Dr. Welch found  
10 basically normal range of motion with some limitation but a  
11 negative leg raise. Dr. Greenspan's consultative report also  
12 supports the ALJ.

13           Clearly, obesity is an issue. But there is nothing  
14 from anyone, including the consultative reports and nurse  
15 practitioner Wilkinson, that suggests that the obesity, in  
16 combination with the degenerative disc disease, poses a  
17 limitation that is inconsistent with the residual functional  
18 capacity. So the nurse practitioner Wilkinson, for example,  
19 already indicated at 438, also 440, indicates that plaintiff  
20 has no acute distress and ambulates normally.

21           Certainly the ALJ is obligated to make a  
22 credibility assessment and adequately explain it.

23           I reject the notion that the finding has to be  
24 supported by clear and convincing evidence. I think what the  
25 cases say is that it needs to be clearly explained.

1           At Page 27 I think the ALJ did a minimally good job  
2 at explaining her rationale. She went through several  
3 factors, including the receipt of unemployment benefits and  
4 the certification she's willing to work, the time she spent  
5 taking online courses, her ability to sit for extended  
6 periods and ambulate normally, her ability to take care of  
7 her personal needs and shop, prepare meals, drive, keep  
8 appointments, use of the computer, watching television. So I  
9 think that that was adequately explained and is supported by  
10 substantial evidence.

11           I know the plaintiff has raised questions about the  
12 new evidence submitted to the Social Security Appeals  
13 Council. It was, in my view, considered and it does not  
14 undermine the ALJ's determination.

15           The fact of the matter is that it was plaintiff's  
16 burden at step four to establish that she cannot perform work  
17 as a school fundraiser and she failed to carry that burden.

18           There's no question in my mind that the plaintiff  
19 suffers from several diagnosed conditions and that her back  
20 condition is progressively worsening, there is no doubt, and,  
21 ultimately, she may become disabled. But my task is  
22 determining whether as of the date of the ALJ's decision she  
23 was disabled and I find substantial evidence supports the  
24 conclusion that she was not.

25           So I will award judgment on the pleadings to the

1 defendant.

2 I'll send out a short form order shortly.

3 Thank you both for excellent written and oral  
4 presentations. Happy holidays.

5 MS. MYERS: Thanks, your Honor.

6 MR. SCHNEIDER: Thank you.

7 (Proceedings were adjourned.)  
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C E R T I F I C A T I O N

I, DIANE S. MARTENS, Registered Professional Reporter, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same, that the foregoing is a true and correct copy of same and the whole thereof.

*Diane Martens*

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DIANE S. MARTENS, FCRR